with Staff to arrive at satisfactory language." *ETC Order*, ¶ 77. The delegation of such discretion to Staff is arbitrary and capricious. Any rules adopted by this Commission must establish clear and definite standards to be susceptible of general application. As drafted, the competitive ETC advertising requirements are unreasonably vague and, therefore, administratively unenforceable.

20. Likewise, the competitive ETC advertising requirements are overbroad. The rules as adopted would require a competitive ETC to include a notice concerning the carrier's "universal service obligation," contact information for the Office of Public Affairs and Consumer Protection and a notice advising consumers about a rate plan that does not include a termination fee in all of the carrier's advertisements within its designated ETC service area. Although the Commission relies on similar conditions imposed in earlier competitive ETC designation proceedings (*ETC Order*, ¶10), the requirements adopted in the *ETC Order* go far beyond any action the Commission has taken in the past.

21. In each of the prior cases relied on by the Commission, the condition imposed on the competitive ETC was limited to print (*i.e.*, newspaper) advertising. As noted in each of the Orders acknowledging compliance with the Commission's advertising conditions, the Commission observed that "Staff has reviewed a sample advertisement and the font size and placement is appropriate."[7] Under the *ETC Order*, however, the advertising requirement does not appear to be limited to print media, but rather applies to all of the ETC's advertisements.

[7] *See In the Matter of the Application of ALLTEL Kansas Limited Partnership for Designation as an Eligible Telecommunications Carrier*, Docket No. 04-ALKT-283-ETC, *Order* (Dec. 21, 2004); *In the Matter of Petition of RCC Minnesota, Inc. for Designation as an Eligible Telecommunications Carrier*, Docket No. 04-RCCT-338-ETC, *Order* (Dec. 22, 2004); *In the Matter of the Application of H&B Cable Service, Inc. for Designation as an Eligible Telecommunications Carrier*, Docket No. 04-HBCT-1107-ETC, *Order* (Jan. 26, 2005).

Although the *ETC Order* is unclear, this requirement may be read to include all radio, television, Internet, billboard, point-of-sale and sponsorship or other new media advertising channels.

22. As previously noted, competitive ETCs like Sprint Nextel advertise nationally and the requirement to tailor national advertising materials to state-specific advertising requirements is unduly burdensome. This is particularly true for media which is inherently interstate in nature like radio, television and the Internet or other new media channels. Advertisements placed in these types of media may be heard or viewed by consumers in neighboring states or even throughout the country. Even within the State of Kansas, a competitive ETC will be substantially burdened by the requirement to include specific notices in all of its advertisements. Sprint Nextel, for example, will be unable to limit the distribution of its advertisements to only those areas where the Company has been designated as a competitive ETC. As a result, consumers outside the Company's designated ETC service areas may be misinformed or confused by the notices required under the *ETC Order*, which could have the unintended effect of creating ill-will in the marketplace.

IV. THE *ETC ORDER'S* PER MINUTE BLOCKING AND TERMINATION FEE REQUIREMENTS ARE PREEMPTED BY FEDERAL LAW

A. The Per Minute Blocking And Termination Fee Requirements Violate 47 U.S.C. § 332(c)(3)(A)

23. The Commission should reconsider adoption of the *ETC Order's* requirement that ETCs who do not provide unlimited local usage must offer free per minute blocking of local usage to Lifeline customers (*ETC Order*, ¶ 16) and the requirement for wireless ETCs to offer at least one calling plan without a termination fee (*ETC Order*, ¶ 33). These requirements constitute unlawful state regulation of a wireless carrier's rates and entry in violation 47 U.S.C. § 332(c)(3)(A), which provides in pertinent part:

> [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services . . .

47 U.S.C. § 332(c)(3)(A) (emphasis added).

24. The FCC has long recognized that 47 U.S.C. § 332(c)(3)(A)'s broad prohibition against state regulation of any aspect of the "rates charged" by wireless carriers includes "both rate levels and rate structures."[8] This restriction prevents states from both "determin[ing] the reasonableness of a prior rate or set[ting] a prospective charge for service."[9] Wireless carriers' post-paid rate structures are generally comprised of several components, including a monthly access charge, excess usages charges, an activation charge, an early termination charge and roaming charges.[10] Because these rate components are inextricably intertwined in establishing the rate charged for service, the Commission is precluded by 47 U.S.C. § 332(c)(3)(A) from

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[8] *See In the Matter of Southwestern Bell Mobile Systems, Inc. Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments*, *Memorandum Opinion and Order*, 14 F.C.C.R. 19898, FCC 99-356, ¶ 7 (rel. Nov. 24, 1999) ("Section 332(c)(3)(A) bars lawsuits challenging the reasonableness or lawfulness *per se* of the rates or rate structures of CMRS providers"); *In the Matter of Wireless Consumers Alliance, Inc., Petition for a Declaratory Ruling*, WT Docket No. 99-263, *Memorandum Opinion and Order*, 15 F.C.C.R. 17021, FCC 00-292, ¶ 13 (rel. Aug. 14, 2000) ("At the outset of our analysis on the preemptive scope of Section 332, we observe that Section 332(c)(3)(A) bars state regulation of, and thus lawsuits regulating, the entry of or the rates or rate structures of CMRS providers"). Because Congress delegated authority to the FCC to administer the Telecommunications Act, its interpretations of the Act are entitled to deference. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

[9] *AT&T Corp. v. FCC*, 349 F.3d 692, 701 (D.C. Cir. 2003) ("[S]tate courts may not determine the reasonableness of a prior rate or set a prospective charge for service"); *see also Bastien v. AT&T Wireless Serv., Inc.*, 205 F.3d 983, 987 (7th Cir. 2000) ("Congress intended complete preemption" of state regulation of rates charged by wireless carriers).

[10] *See In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, *First Report*, 10 F.C.C.R. 8844, FCC 95-317 ¶ 70 (rel. Aug. 18, 1995).

requiring a wireless ETC to provide Lifeline subscribers per minute blocking free of charge or requiring a wireless ETC to provide a rate plan that does not include a termination fee.[11]

25. Although the Commission acknowledges the preemptive limitations of Section 332(c)(3)(A), it suggests the statute does not apply in this case because "[w]ireless carriers that seek ETC designation for the purpose of receiving [federal] universal service support submit themselves to the Commission's jurisdiction and assent to the imposition of certain conditions for the purpose of receiving that designation." *ETC Order*, ¶ 33. Sprint Nextel must again respectfully disagree. Nothing in the ETC designation process supersedes the limitations on state regulation of wireless carriers imposed by 47 U.S.C. § 332(c)(3)(A).

26. A state regulatory commission's authority to designate telecommunications carriers as ETCs derives from 47 U.S.C. § 214(e). Yet 47 U.S.C. § 214 and 47 U.S.C. § 332 are not mutually exclusive. Rather, the statutes must each be given independent significance and the application of both statutes must be harmonized.[12] To that end, the FCC has determined that nothing in 47 U.S.C. § 214(e) trumps the limitations on state regulation imposed by 47 U.S.C. § 332(c)(3)(A):

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[11] Sprint Nextel is certainly mindful of the Commission's authority as it relates to the administration of the Lifeline and Link Up programs. However, nothing in the Federal Telecommunications Act or the FCC's low-income universal service rules (47 C.F.R. §§ 54.400-54.417) permits the Commission to dictate the rate components or features of a wireless ETC's Lifeline service offering. To the contrary, the FCC's low-income universal service rules only require that in a state that mandates Lifeline support – like Kansas - an ETC must utilize the state's Lifeline eligibility criteria (47 C.F.R. § 54.409(a)); procedures for certifying income (47 C.F.R. § 54.410(a)(1)); and procedures for verifying continued eligibility (47 C.F.R. § 54.410(c)(1)).

[12] *See Texas Office of Public Utility Counsel v. Federal Communications Commission*, 183 F.3d 393 (5th Cir. 1999). On appeal of the *Universal Service Order*, the United States Court of Appeals for the Fifth Circuit clarified that other provisions of the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 151, *et seq.*, must be read not to impair or supersede state preemption of CMRS under 47 U.S.C. § 332(c)(3)(A).

> We note that not all carriers are subject to the jurisdiction of a state commission. Nothing in section 214(e)(1), however, requires that a carrier be subject to the jurisdiction of a state commission in order to be designated an eligible telecommunications carrier. Thus tribal telephone companies, CMRS providers, and other carriers not subject to the full panoply of state regulation may still be designated as eligible telecommunications carriers.[13]

27. Indeed, the FCC determined it would be plainly unlawful to deny a wireless carrier ETC designation based on its unique regulatory status under 47 U.S.C. § 332(c)(3)(A):

> We agree with the Joint Board's analysis and recommendation that any telecommunications carrier using any technology, including wireless technology, is eligible to receive universal service support if it meets the criteria under section 214(e)(1). We agree with the Joint Board that any wholesale exclusion of a class of carriers by the Commission would be inconsistent with the language of the statute and the pro-competitive goals of the 1996 Act. The treatment granted to certain wireless carriers under section 332(c)(3)(A) does not allow states to deny wireless carriers eligible status. . . .[14]

28. Similarly, in the *Seventh Report and Order*, the FCC reaffirmed its policy of making support available to wireless carriers despite 47 U.S.C. § 332(c)(3)(A)'s preemption of state rate and entry regulation:

> We conclude, consistent with the Joint Board's recommendation, that the policy the Commission established in the First Report and Order of making support available to all eligible telecommunications carriers should continue. All carriers, including commercial mobile radio service (CMRS) carriers, that provide the supported services, regardless of the technology used, are eligible for ETC status under section 214(e)(1) . . . We re-emphasize that the limitation on a state's ability to regulate rates and entry by wireless service carriers under section 332(c)(3) does not allow the states to deny wireless carriers ETC status.[15]

29. The FCC also addressed this issue in a case arising out a proceeding before this Commission. Following Western Wireless' (now Alltel) designation as a competitive ETC in Kansas, the State Independent Alliance petitioned the FCC for a determination that Western

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[13] *Universal Service Order*, ¶ 147 (emphasis added).

[14] *Id.*, ¶ 145 (emphasis added).

[15] *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Seventh Report and Order*, FCC 99-119, ¶ 72 (rel. May 28, 1999) (emphasis added).

Wireless' basic universal service ("BUS") offering was subject to state regulation. The FCC ruled that the service met the definition of CMRS and was, therefore, within the scope of 47 U.S.C. § 332(c)(3)(A):

> Thus, under section 332(c) of the Act, Kansas may not regulate BUS rates and entry or impose equal access requirements on BUS, although it may regulate other terms and conditions of BUS. We also clarify that none of the exceptions to the proscription of state rate regulation in section 332(c)(3) apply, and that Western Wireless is not subject to federal LEC regulation when providing BUS.[16]

30. Even more recently, the Federal District Court for the District of Colorado struck down the Colorado Public Utilities Commission's attempt to regulate a wireless ETC's rates in violation of 47 U.S.C. § 332(c)(3)(A). *WWC Holding Co. v. Sopkin*, 420 F.Supp.2d 1186, 1193-94 (D. Colo. 2006), *appeal pending*. In *Sopkin*, the court found that a wireless carrier's status as a federal ETC did not authorize the state regulatory commission to regulate the carrier's rates. *Id.* To the contrary, the court found that the state commission must first petition the FCC for regulatory authority under 47 U.S.C. § 332(c)(3)(A) and 47 C.F.R. § 20.13. Because the Colorado Public Utilities Commission failed to follow the prescribed procedures set forth in federal law, the court held the commission had no authority to regulate the wireless ETC's rate structure. *Id.*

31. Thus, it is quite clear the Commission cannot regulate a wireless carrier's rates simply because it has been designated as an ETC. The Commission has taken no action to petition the FCC for authorization to regulate wireless rates in Kansas. Accordingly, the *ETC Order's* per minute blocking and termination fee requirements are preempted by 47 U.S.C. § 332(c)(3)(A) and must be revoked.

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[16] *In the Matter of Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service*, WT-Docket No. 00-239, *Memorandum Opinion and Order*, FCC 02-164, ¶ 15 (rel. Aug. 2, 2002).

B. The Per Minute Blocking And Termination Fee Requirements Impermissibly Regulate Interstate Telecommunications Services

32. The Commission should also reconsider adoption of the *ETC Order's* per minute blocking and termination fee requirements because they constitute unlawful state regulation of interstate telecommunications services. When it enacted 47 U.S.C. § 151, Congress assumed jurisdiction over "all interstate and foreign commerce in communication by wire and radio" and vested regulatory authority in the FCC. 47 U.S.C. § 151. For wireless carriers - like Sprint Nextel - who offer multi-state or nationwide calling areas, the intrastate and interstate components of its service offerings are inseparable. As a result, the Commission is precluded from regulating such wireless service offerings in any respect.

33. Like the jurisdictional limitations discussed above, nothing in the ETC designation process overrides the prohibition against state regulation of interstate telecommunications services. As the Federal District Court for the District of Colorado held in *Sopkin*, there is absolutely no distinction between "ETC services" and other interstate wireless telecommunications services exempt from state regulation:

> In Count II Western Wireless alleges that the Commission has no authority to regulate interstate services. The defendants [*i.e.*, Colorado PUC Commissioners] do not disagree but argue that ETC services are subject to Commission oversight. Because interstate and intrastate services are not separable by wireless service carriers in the competitive market they serve, the Commission's position that it is not regulating interstate services is not tenable.[17]

34. Thus, because the Commission is precluded from regulating the interstate telecommunications services offered by wireless ETCs, it must reconsider and reject adoption of the per minute blocking and termination fee requirements set forth in the *ETC Order*.

[17] *Sopkin*, 420 F.Supp.2d at 1194.

V. THE *ETC ORDER'S* TERMINATION FEE REQUIREMENT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

35. The Commission should further reconsider adoption of the requirement that wireless carriers offer at least one rate plan that does not include a termination fee because the need for such requirement is not supported by the record.

36. State law provides that an agency's action is invalid if based on a determination of fact that is not supported by substantial evidence when viewed in light of the record as a whole. K.S.A. § 77-621(c)(7). To be reasonable, a Commission order must be based on substantial, competent evidence. *Kansas-Nebraska Gas Co. v. Kansas Corporation Commission*, 610 P.2d 121, 126 (Kan. 1980). The findings of the Commission must be based upon facts. It must be possible for the reviewing court to measure the findings against the evidence from which they were educed. Findings not based on substantial evidence, but on suspicion and conjecture, are arbitrary and baseless. *Southwestern Bell Tel. Co. v. State Corp. Comm.*, 386 P.2d 515, 524 (Kan. 1963). K.S.A. 77-621(c)(8) similarly provides that agency action may be set aside if it "is otherwise unreasonable, arbitrary or capricious." "Unreasonable" action is action taken without regard to the benefit or harm to all interested parties. Agency action is arbitrary and capricious if the action is unreasonable or without foundation in fact." *Peck v. Univ. Resident's Committee of Kansas State Univ.*, 807 P.2d 652, 657 (Kan. 1991).

37. In this case, the termination fee requirement set forth in the *ETC Order* is not supported by sufficient record evidence to withstand scrutiny. As discussed in the *ETC Order*, the sole basis relied on by the Commission to require wireless carriers to offer a rate plan that does not include a termination fee is perceived consumer dissatisfaction evidenced by "over

1,000 complaints during 2005 regarding termination fees." *ETC Order*, ¶ 31.[18] The source of this figure is Staff's reference to the FCC's *Quarterly Report on Informal Consumer Inquiries and Complaints, 3rd Quarter Calendar Year 2005* (Nov. 4,2005).[19] Notably, as set forth in the FCC Report, the existence of a complaint does not necessarily connote wrongdoing on the part of a carrier:

> A complaint is defined as a communication received at CGB's consumer center either via letter, fax, email or telephone from or on behalf of an individual that: (i) identifies a particular entity under the FCC's jurisdiction; (ii) alleges harm or injury; and (iii) seeks relief. The FCC receives many complaints that do not involve violations of the Communications Act or a FCC rule or order. The existence of a complaint does not necessarily indicate wrongdoing by the company involved.[20]

38. Moreover, what Staff's reference to a single FCC quarterly report fails to reflect is the overall downward trend in complaints related to termination fees, while at the same time wireless carriers have experienced a steady increase in subscribership. This inverse relationship is well documented in publicly available data. For example, the FCC's complaint report for the 2nd Quarter of 2006 identifies only 482 complaints related to termination fees.[21] Whereas, the FCC's most recent wireless competition report indicates that the total number of wireless subscribers in the United States has been increasing at the rate of approximately 20 million subscribers per year for the last three years.[22] As of December 2005, the FCC estimates there

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[18] Indeed, the record in this matter is devoid of any empirical data demonstrating significant consumer complaints regarding termination fees in Kansas.

[19] http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-262020A1.pdf

[20] *Id.*, p. 9.

[21] http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267246A1.pdf

[22] *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 06-17, *Eleventh Report*, FCC 06-142, Table 1 (rel. Sept. 29, 2006).

were over 203 million wireless subscribers nationwide.[23] Thus, even taking Staff's reference to over 1,000 termination fee complaints at face value, it would indicate that only 0.005% of all the wireless subscribers in the United States filed complaints with the FCC regarding termination fees. Indeed, even if every one of the 1,000 termination fee complaints filed with the FCC had originated in Kansas, that would still amount to less than one-tenth of one percent of all wireless subscribers in the State (approximately 1.7 million).[24]

39. Further, wireless complaint rates as a whole are simply dwarfed by the number of complaints concerning wireline telecommunications services. As reported in the FCC's report for the 3rd Quarter of 2005 cited by Staff, wireline customers filed nearly 21,000 complaints with the FCC (*i.e.*, 0.012% of all wireline subscribers).[25] Whereas, the total number of wireless complaints was only 6,873, or just 0.003% of all wireless subscribers. Thus, wireline carriers received approximately three times the number of FCC complaints as wireless carriers nationwide.

40. While Sprint Nextel is certainly sensitive to consumer concerns, the actual statistics clearly demonstrate that the Commission's efforts to regulate wireless termination fees are unsupported by the record and legally unwarranted.

41. The termination fee requirement is also duplicative and unnecessary. As set forth in the *ETC Order*, the Commission determined that a wireless carrier's commitment to comply with the CTIA Consumer Code for Wireless Service ("Consumer Code") sufficiently

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[23] *Id.*, Table 2.

[24] *Id.*

[25] *See* footnote 19, *supra*. As of December 2005, the FCC estimates there were a little over 175 million switched access lines served by incumbent and competitive LECs nationwide. *Local Telephone Competition: Status as of December 31, 2005*, Industry Analysis and Technology Division, Wireline Competition Bureau (July 2006). Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-266595A1.pdf

demonstrates compliance with objective consumer protection and service quality standards. *ETC Order*, ¶ 39. Section One of the Consumer Code requires signatories to disclose any applicable termination fees as follows:

> For each rate plan offered to new consumers, wireless carriers will make available to consumers in collateral or other disclosures at point of sale and on their web sites, at least the following information, as applicable: . . . any early termination fee that applies and the trial period during which no early termination fee will apply.[26]

Likewise, Section Five of the Consumer Code requires signatories to disclose applicable termination fees to the extent possible in their advertising materials.[27]

42. The Consumer Code further requires signatories to provide an initial trial period of not less than 14 days, during which "[t]he carrier will not impose an early termination fee if the customer cancels service within this period, provided that the customer complies with applicable return and/or exchange policies."[28] Carriers must also provide advance notice prior to modifying the material terms of a subscriber's contracts in a manner that is materially adverse to the subscriber and allow the subscriber not less than 14 days to cancel his or her contract with no termination fee.[29] In fact, Sprint Nextel exceeds the 14-day period required by the Consumer Code. Sprint Nextel has adopted a 30-day trial period with no termination fee.

43. As the Commission has already acknowledged, the Consumer Code's service requirements provide consumers sufficient notice of any applicable termination fees and the opportunity to terminate service within 14 days without a termination fee if the consumer is dissatisfied with the service or if the terms of service are materially and adversely modified. The Commission must, therefore, reconsider its contrary finding that wireless ETCs must also offer at

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[26] *See* http://files.ctia.org/pdf/The_Code.pdf

[27] *Id.*, Section Five.

[28] *Id.*, Section Four.

[29] *Id.*, Section Seven.

least one rate plan without a termination fee as the need for such a requirement is entirely unsupported by the record.

VI. THE *ETC ORDER'S* LIFELINE MANDATE VIOLATES 47 C.F.R. § 54.403(b)

44. The Commission should reconsider the adoption of the requirement that all ETCs apply the federal Lifeline discounts to any rate plan selected by a subscriber because it plainly violates 47 C.F.R. § 54.403(b). Such a requirement is contrary to federal law and, therefore, unlawful.

45. To implement changes in the federal Lifeline program following the adoption of the Telecommunications Act of 1996, the FCC promulgated specific rules governing the administration of the program. These regulations are codified at Part 54, Subpart E (47 C.F.R. §§ 54.400-54.417) of the FCC's rules. As set forth in the FCC's universal service rules, Lifeline is defined as "a retail local service offering: (1) [t]hat is available only to qualifying low-income consumers; (2) [f]or which qualifying low-income consumers pay reduced charges as a result of application of the Lifeline support amount described in [47 C.F.R. §] 54.403."[30] Section 54.403, in turn, defines the amount of federal Lifeline support available and the limitations on the application of such support.

46. Pursuant to 47 C.F.R. § 54.403(a), federal Lifeline support is comprised of four credits or "Tiers." "Tier One" support is equal to the monthly "tariffed rate in effect for the primary residential End User Common Line charge[31] of the incumbent local exchange carrier serving the area in which the qualifying low-income consumer receives service."[32] "Tier Two"

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[30] 47 C.F.R. § 54.401(a) (emphasis added).

[31] The "End User Common Line" charge is also referred to as the "Subscriber Line Charge" or "SLC."

[32] 47 C.F.R. § 54.403(a)(1).

support is equal to $1.75 per month.[33] "Tier Three" support is equal to "one-half the amount of any state-mandated Lifeline support or Lifeline support otherwise provided by the carrier, up to a maximum of $1.75 per month."[34] If applicable, "Tier Four" provides up to an additional $25 per month for eligible resident of Tribal lands, provided the additional support "does not bring the basic local residential rate (including any mileage, zonal, or other non-discretionary charges associated with basic residential service) below $1 per month.[35]

47. Application of federal Lifeline support to a qualifying customer's basic residential rate is governed by 47 C.F.R. § 54.403(b), which provides in pertinent part:

> Eligible telecommunications carriers that charge federal End User Common Line charges or equivalent federal charges shall apply Tier-One federal Lifeline support to waive the federal End-User Common Line charges for Lifeline consumers. Such carriers shall apply any additional federal support amount to a qualifying low-income consumer's intrastate rate, if the carrier has received the non-federal regulatory approvals necessary to implement the required rate reduction. Other eligible telecommunications carriers **shall** apply the Tier-One federal Lifeline support amount, plus any additional support amount, to reduce their lowest tariffed (or otherwise generally available) residential rate for the services enumerated in Sec. 54.101(a)(1) through (a)(9), and charge Lifeline consumers the resulting amount.

47 C.F.R. § 54.403(b) (emphasis added).[36]

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[33] 47 C.F.R. § 54.403(a)(2).

[34] 47 C.F.R. § 54.403(a)(3).

[35] 47 C.F.R. § 54.403(a)(4) (emphasis added).

[36] Several states have reiterated the preemptive requirements of 47 C.F.R. § 54.403(b) in their own rules. *See, e.g.*, Texas P.U.C. Subst. R. 26.412(c)(2)(A)(i) ("If the participating telecommunications carrier does not charge the federal SLC, it shall reduce its lowest tariffed residential rate for supported services by the amount of the SLC tariffed by the ILEC serving the area of the qualifying low-income customer."); 199 Iowa Admin. Code § 39.3(2)(b)(2) ("Eligible carriers that do not charge federal end-user common line charges or equivalent federal charges must apply the federal baseline Lifeline support amount of $3.50 to reduce the Lifeline consumer's lowest tariffed residential rate"); 65-407 Code Me. R., Chpt. 294, § 4 ("If the eligible telecommunications carrier does not charge the federal SLC, it shall apply the $3.50 federal baseline support amount to reduce its lowest tariffed residential rate for supported services"); *Public Service Commission Universal Service – FCC PSC Comments/Letters*, Case No. PU-439-96-149, *North Dakota Lifeline and Link Up Plan*, p. 2 (Nov. 5, 1997), *rev'd* (June 8, 2005)

48. In other words, carriers that do not charge the federal End User Common Line – *i.e.*, wireless ETCs and other competitive carriers – must provide a Tier One discount equal to the End User Common Line charge of the ILEC serving the area in which the qualifying low-income consumer receives service plus applicable Tier Two, Tier Three and Tier Four discounts to reduce the cost of the carrier's lowest residential rate.

49. In adopting the regulations discussed above, the FCC determined that federal Lifeline support shall be portable and that competitive ETCs must apply the federal Lifeline support they receive to the carrier's lowest rate for the services enumerated in 47 C.F.R. § 54.101(a)(1)-(a)(9):

> These rules require that carriers offer qualified low-income consumers the services that must be included within Lifeline service, as discussed more fully below, including toll-limitation service. ILECs providing Lifeline service will be required to waive Lifeline customers' federal SLCs and, conditioned on state approval, to pass through to Lifeline consumers an additional $1.75 in federal support. ILECs will then receive a corresponding amount of support from the new support mechanisms. Other eligible telecommunications carriers will receive, for each qualifying low income consumer served, support equal to the federal SLC cap for primary residential and single-line business connections, plus $1.75 in additional federal support conditioned on state approval. The federal support amount must be passed through to the consumer in its entirety. In addition, all carriers providing Lifeline service will be reimbursed from the new universal service support mechanisms for their incremental cost of providing toll-limitation services to Lifeline customers who elect to receive them. The remaining services included in Lifeline **must be provided** to qualifying low-income consumers at the carrier's lowest tariffed (or otherwise generally available) rate for those services, or at the state's mandated Lifeline rate, if the state mandates such a rate for low-income consumers.

Universal Service Order, ¶ 368 (emphasis added).

50. The Commission relied on the following two arguments offered by Staff to reach a contrary interpretation of 47 C.F.R. § 54.403(b): (1) that the limitation of Lifeline support to

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("An eligible telecommunications carrier providing Lifeline service shall adjust its lowest tariffed (or otherwise generally available) residential rate for Lifeline service to qualified low-income customers by reducing the total amount due for monthly universal service by $5.25.")

the lowest residential rate ignores the parenthetical language "or otherwise generally available;" and (2) that the FCC's website provides no indication that the Lifeline program is limited to the lowest price plan. *ETC Order*, ¶ 65. Neither of these arguments is persuasive.

51. First, while the Commission faults other commenters for ignoring the parenthetical language, Staff's interpretation of 47 C.F.R. § 54.403(b) ignores the term "lowest" and simply reads it out of the rule. The Commission must construe section 54.403(b) to give meaning to all of the words.[37] 47 C.F.R. § 54.403(b) is unambiguous. Under the plain language of rule, the parenthetical "or otherwise generally available" is intended to modify the term "tariffed" to accommodate ETCs that do not provide service under a tariff, but rather provide service on an individual contract basis. In this context, the FCC wanted to ensure that Lifeline customers were enrolled in either the "lowest tariffed" or "lowest generally available" residential rate plan, depending upon the type of carrier at issue.

52. In contrast, Staff's interpretation of 47 C.F.R. § 54.403(b) leads to the untenable conclusion that the parenthetical language is meant to modify the term "lowest," such that the rule would read "lowest, or otherwise generally available, residential rate." This result is nonsensical. If the FCC meant for Lifeline support to be applied to any residential rate plan, it would not have used the term "lowest" and would not have included the parenthetical "or otherwise generally available." Rather, the FCC would have simply stated "to reduce their residential rate."

53. Staff's interpretation of 47 C.F.R. § 54.403(b) is also counterintuitive when one considers the purpose of the federal Lifeline and Link Up assistance programs. Lifeline and

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[37] *See CURB v. Kansas Corporation Commission, et al.*, 264 Kan. 363 (1998) ("Courts must 'construe all provisions of statutes *in pari materia* with a view of reconciling and bringing them into workable harmony, if reasonably possible to do so.'") (citing *Kansas-Nebraska Natural Gas Co. v. State Corporation Commission*, 176 Kan. 561, 271 P.2d 1091 (1954)).

Link Up are intended to assist low-income consumers obtain and maintain basic access to the public switched telephone network ("PSTN"). To further this purpose, the FCC adopted the toll-limitation requirement to ensure low-income consumers would not be disconnected from the PSTN due to uncontrolled toll charges. Likewise, the FCC mandated under 47 C.F.R. § 54.403(b) that low-income consumers subscribe to the lowest cost residential rate plan offered by an ETC so as not to incur excessive monthly charges. It would therefore be inconsistent with the purpose of the low-income universal service fund to force carriers to modify their systems to include higher-cost plans in the Lifeline and Link Up programs. Accordingly, Staff's interpretation of 47 C.F.R. § 54.403(b) cannot be reconciled with the FCC's mandate and must be rejected.

54. The Commission's reliance on Staff's review of the FCC's website is similarly misplaced. General descriptions of the federal Lifeline program posted on the FCC's website have no precedential value. In any event, the FCC's alleged description of Lifeline as a "telephone discount program [that] gives people with low incomes a discount on basic monthly service for the phone at their principal place of residence" is immaterial.[38] The FCC, like this Commission, speaks only through its written Orders or decisions. As set forth above, the FCC's *Universal Service Order* and 47 C.F.R. § 54.403(b) unambiguously provide that federal Lifeline support may only be applied to reduce the monthly charges for an ETC's lowest residential rate plan. Nothing in the FCC's general description of the Lifeline program relied on by Staff contradicts this requirement. But even if it did, such general statements have no legal effect.

[38] It is unclear which FCC webpage Staff reviewed as no citation is provided in Staff's Comments. Currently, the FCC's consumer center webpage describes Lifeline as follows: "The federal Lifeline Program gives income-eligible consumers a discount on monthly charges for basic local landline or wireless residential telephone service purchased from an authorized landline or wireless service provider." http://www.lifeline.gov/lifeline_Consumers.html

55. Accordingly, the Commission should reconsider the adoption of the requirement that all ETCs apply the federal Lifeline discounts to any rate plan selected by a subscriber and amend to *ETC Order* to omit this requirement.

WHEREFORE, Sprint Nextel respectfully requests that the Commission reconsider adoption of the following requirements set forth in the *ETC Order*:

(a) That Competitive ETCs include language in all their advertising in their Kansas ETC areas explaining their obligation to provide universal service and include information on how customers can contact the Commission's Office of Public Affairs and Consumer Protection.

(b) That ETCs that do not offer unlimited local usage offer free optional per minute blocking of local usage to Lifeline customers within 90 days.

(c) That wireless ETCs offer one calling plan without a termination fee.

(d) That all ETCs must allow Lifeline customers to choose a calling plan and apply the Lifeline discount to the plan selected by the customer.

Respectfully submitted,

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Its Counsel

VERIFICATION

I, Diane C. Browning, being of lawful age duly sworn, state that I have read the above and foregoing Petition for Reconsideration and verify the statements contained herein to be true and correct to the best of my knowledge and belief.

Diane C. Browning

Subscribed and sworn to before me this 19th day of October, 2006.

NOTARY PUBLIC – State of Kansas
RHAMIE GLADE
My Appt. Exp. 9-12-08

Notary

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 19th day of October, 2006, a copy of the foregoing Petition for Reconsideration was served via U.S. Mail, postage prepaid, on each of the following:

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ATTACHMENT 3

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before: Brian J. Moline, Chair
Robert E. Krehbiel
Michael C. Moffet

In the Matter of General Investigation Addressing Requirements for Designation Of Eligible Telecommunications Carriers	)))	Docket No. 06-GIMT-446-GIT

PETITION FOR RECONSIDERATION

Comes Alltel Kansas Limited Partnership (Alltel) pursuant to K.S.A. §§ 66-118b and 77-529, K.A.R. §82-1-235 and petitions the Commission for reconsideration of the Order Adopting Requirements for Designation of Eligible Telecommunications Carriers. In support of this petition, Alltel states as follows:

1. On October 2, 2006 the Commission issued its Order Adopting Requirements For Designation of Eligible Telecommunications Carriers (the "Order"). Two aspects of the Order require reconsideration: (1) The Order addressed Content, Frequency and Types of Media Advertising, and imposed unnecessary and burdensome requirements with respect to all advertising of competitive ETCs although the same objectives could be accomplished on a much more practical and less burdensome basis (Order Paragraphs 9 to 13); and (2) in addressing Lifeline, the Order misinterprets the FCC Rule and requires that Lifeline discounts be made applicable to all rate plans rather than only the ETC's lowest rate plan provided in the Carrier's tariff or that it generally makes available. (Order Paragraphs 63 to 67).

2. The Commission should reconsider these two requirements and modify them to (1) require ETC and Lifeline language only in periodic advertisements targeted to local media distribution and (2) modify its Lifeline requirement to acknowledge that FCC rules only require

Lifeline discounts for the lowest priced plan of the ETC. Alltel recommends the Commission direct any interested parties and Staff to meet and find practical less burdensome means of addressing the objectives and concerns regarding these issues and those raised by any others.

Advertising Requirements

3. While the Commission has required certain ETCs to include ETC information in their advertising, Alltel continues to believe, as expressed in its earlier comments in this matter, that there are more practical, efficient and less burdensome and confusing means of accomplishing the same objectives. However, while Alltel is suggesting less burdensome alternatives and solutions to accomplish the Commissions objectives, it is not conceding and does not agree that the Commission has the requisite authority to impose such regulation on wireless carriers. (See K.S.A. § 66-104a(c))

4. The Commission's objectives or reasons for attempting to impose the requirement, as stated in the Order, are that it is "important that customers are fully informed when choosing telecommunications providers", that the information provided in the advertisement be "meaningful", "so that consumers will understand what they can expect from an ETC" and so that consumers will have "contact information" regarding the Commission so as to register any complaints. (Order Paragraphs 12 and 13). To accomplish these objectives, however, it is not necessary to require that "all advertising" of the ETC that will be placed in an ETC area include all such information. If the intent is to include literally all advertising such is not practical and will confuse more consumers that are not located in an ETC area than will inform those within an ETC related area. Moreover, ETCs already accomplish very thorough communication to target the potential beneficiaries of Lifeline as required by the federal ETC requirements.

5. As previously explained, most wireless ETCs, such as Alltel, are national carriers and their advertisements are national or regional in scope and content. To require that these advertisements include Kansas- specific information is not practical and certainly not well focused, especially in light of the fact that competitive ETCs use a variety of outreach methods to inform consumers of their services and to reach diverse audiences. For example, Alltel conducts outreach with appropriate government agencies in order to notify low-income consumers of its Lifeline offering. This outreach has a more precise target and, therefore, is able to provide more detailed information about the underlying Lifeline program and more accurately reach the low-income consumers that qualify for Lifeline. Alltel also conducts outreach in the form of local newspaper advertising to reach a more general audience. Alltel also conducts outreach through the more expensive media, television and radio advertising, that, while targeting a greater audience, communicate less information as the time frame is shorter. It is not practical or economically feasible to require ETCs to provide the same level of detail in all advertising regardless of the media used. While Alltel does not believe that is the intent of the new rule, the literal interpretation and rejection of prior comments seems to indicate that is the result. The Commission should not attempt to eliminate the flexibility of ETCs to customize ETC messages based on the precision of the target audience and the choice of media. A more efficient and still effective requirement would be to include Kansas-specific information in periodic targeted local media either specifically for ETC information purposes or in only those advertisements carried by local rather than national media. Consistent with federal ETC requirements targeted advertising should be recognized as appropriate.

6. The above comments and Alltel proposals are fully compliant with the FCC's general outreach or advertising requirements for ETCs. The FCC's requirements applicable to

Lifeline specifically, however, is more focused. 47 C.F.R. 54.201(d)(2) states that "[an ETC] shall advertise the availability of such services and the charges therefore using media of general distribution." Even this general ETC advertising requirement does not require it to be in "all advertising", and when addressing Lifeline specifically, 47 C.F.R. 54.405(b) provides that an ETC "shall publicize the availability of Lifeline service in a manner reasonably ***designed to reach those likely to qualify*** for the service." (emphasis added). The Lifeline specific rule requires only that the advertising be targeted to a narrower, more precise, audience than the more general ETC rule. The policy behind the differing levels of outreach requirements is clear: the government intends to promote Lifeline reduced rate service to those specific consumers who should be made aware of the program; hence the limiting and specific language.

7. The rule as written imposes a greater requirement on competitive ETCs than on incumbent ETCs without justification. Incumbent ETCs apparently satisfy their advertising requirement principally by placing information in directories, which are then distributed to customers only after they have become customers. Competitive ETCs, however, are being asked to include such information in all advertising which they may place, regardless of media chosen. Any expanded advertising requirements should be made applicable to all ETCs. There is simply no valid distinction.

8. Alltel recommends that flexibility should be provided competitive ETCs to fashion an appropriate targeted advertising message and program to accomplish the above goals consistent with federal requirements without confusion or unnecessary expense or burden. The details of what is appropriate and necessary should not be imposed in rules, but rather should be discussed among interested parties and Staff and a general agreement reached regarding what can and should be done to make those who qualify for Lifeline and ETC benefits in general,